Supreme Court, U.S.

991713 APR 25 2000

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Boyadjian — PETITIONER

VS.

CIGNA Companies — RESPONDENTS

AFIA WORLDWIDE INSURANCE

CIGNA' AFIA RETIREMENT PLAN ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert Boyadjian

P.O. Box 5845

Somerset, New Jersey 08875

(908) 707-1660

75 pp

QUESTIONS PRESENTED

1. Was the Order of the District Court filed on July 31, 1997 (Appendix C), a final and appealable Order under 28 USC § 1291, irrespective of the request by the Court to submit a bill of costs within 30 days, later reviewed by the Judge?
2. Are costs and fees authorized under ERISA, 29 USC § 1132(g) granted as part of the merits of the case, when the relief is prayed for as part of the initial claim, and not subject to prevail in the case?
3. Can any authorized type of costs and fees under ERISA, 29 USC § 1132 (g) be denied to a pro-se litigant, on the sole basis of self representation when such expense is incurred and necessary for the case?
4. Did the District Court erred by refusing to consider an amendment regarding a violation of the law asserted by the plaintiff? More specifically; a treaty between The United States of America and The Kingdom of Belgium regarding the totalization of Social Security taxes and benefits; and The United States Constitution, Article III Section 2[1] ?
5. Does ERISA §502(a)(3), 29 USC § 1132 a(3) authorizing "other equitable relief" for violation of fiduciary duties, provides or contemplates relief for punitive damages and/or emotional distress, to plan participants or beneficiaries ?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 12

REASONS FOR GRANTING THE WRIT 19

CONCLUSION 36

INDEX TO APPENDICES

APPENDIX A UNITED STATES COURT OF APPEALS JUDGMENT AND OPINION DATED, THE 30th DAY OF NOVEMBER

APPENDIX B DISTRICT COURT OPINION AND ORDER FILED, THE 6 DAY OF MARCH, 1998

APPENDIX C DISTRICT COURT OPINION AND ORDER FILED, THE 31 DAY OF JULY, 1997

APPENDIX D UNITED STATES COURT OF APPEALS SUR PETITION FOR REHEARING DATED, THE 1st DAY OF FEBRUARY, 2000

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Accord Vargas v. Hudson County Bd. of Elections, 949 F.2d 665, 670 (3d Cir. 1991)	26, 28
ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation v. * BEAZER EAST, INC., a Delaware corporation; CHICAGO BRIDGE & IRON COMPANY,an Illinois corporation Beazer East, Inc., a Delaware corporation, Appellant UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT 124 F.3d 551; 1997 U.S. App.	22
Apex Fountain Sales, Inc. v. Kleinfeld, F.3d 931, 934-35 (3d Cir. 1994)	25
Apex, 27 F.3d at 936 (quoting Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1544 n.52 (3d Cir. 1993))	25, 26
Beckwith Machinery Co. v. Travelers Indem. Co., 815 F.2d 286 (3d Cir. 1987)	22, 27
Beckwith Machinery Co., supra, at 290	29, 30
Becton Dickinson & Co. v. District 65, United Auto., Aerospace and Agric. Implement Workers of Am.,AFL-CIO, 799 F.2d 57, 61-62 (3d Cir. 1986) Sleight, 808 F.2d at 1015	25
Becton Dickinson and Co. v. United Automobile, Aerospace and Agricultural Implement	27

Workersof America, 799 F.2d 57, 61-62
(3d Cir. 1986)

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 29

Budinich v. Becton Dickinson & Co., 486 U.S. 17, 18, 26, 28
196; 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)

C.I.T. Corp. v. Nelson, 743 F.2d 774, 20
775 (11th Cir.1984)

Catlin v. United States, 324 U.S. 229, 233, 23, 24
89 L. Ed. 911, 65 S. Ct. 631 (1945)

Carter v. Veterans Administration, 780 F.2d 1479, 1482 32

Cook, 6 Vet.App. at 236, the Court cited Naekel, 32
845 F.2d at 981

DICKINSON v. PETROLEUM CORP., 338 U.S. 507 33, 35

EISEN v. CARLISLE & JACQUELIN ET AL 29

F.H. Krear & Co. v. Nineteen Named Trustees, 20, 29, 30
776 F.2d 1563, 1564 (2nd Cir.1985)

Fort v. Roadway Express, Inc., 746 F.2d 744, 21, 29, 30
747-48 (11th Cir.1984)

Harrington v. Texaco, Inc., 339 F2d 814 31

Harry HOLMES, Plaintiff-Appellee, v. 21
J. RAY McDERMOTT & COMPANY, INC.,
734 F.2d 1110;

Holmes v. J. Ray McDermott & Co., 20, 28

682 F.2d 1143, 1146 (5th Cir.1982)
459 U.S. 1107

IERNA, P.Y. Costello, Inc.,... v. Arthur Murray International, Inc. 833 F.2d 1472 — 20

ISIDOR PAIEWONSKY ASSOCIATES, INC. v. SHARP PROPERTIES, INC. UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT 998 F.2d 145; 1993 U.S. App — 23, 24

Jaffe v. Sundowner Properties, Inc., 808 F.2d 1425, 1427 (11th Cir. 1987) — 21

LEON M. MARTIN v. HAROLD ED BROWN — 24

Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 — 28

Lillie Bell Johnson, Marion freeman and Addie Fortson, on their own behalf Kingston and Lillie McGhee, Plaintiffs-Appellees, v. University of Bridgeport — 20

Marcus v. Township of Abington, 38 F.3d 1367, 1370 (3d Cir. 1994). — 22, 23

McGourkey v. Toledo & Ohio Cent. R. Co., 146 U.S. 536, 544-45 — 35

McLish v. Roff, 141 U.S. 661 — 33

McQurter v. City of Atlanta, 724 F.2d 881, 882 (11th Cir.1984) — 20, 29

MICHAEL J. RAGAN v. TRI-COUNTY EXCAVATING, INC. — 27

MOREY v. BARRINGTON PRESS, INC , 484 U.S. 906 (1987) 29, 30

Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers, 855 F.2d 1080, 1089 3d Cir. 1988) 24

O'Donnell v. Georgia Osteopathic Hosp., Inc., D.C.Ga.1983, 99F.R.D. 578 31

Oxford Prod. Credit Ass'n v. Duckworth, 689 F.2d 587, 588-89 (5th Cir.1982) 21

Ray v. U.S. Dep't of Justice, 770 F.Supp. 1544 31

SPM Corp. v. M/V Ming Moon, 965 F.2d 1297, 1300 (3d Cir. 1992) 26, 28

The White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451, 102 S. Ct. 1162, 1166, 71 L. Ed. 2d 325 (1982) 20

Todd Shipyards Corp. v. Auto Transportation, S.A., 763 F.2d 745, 751 (CA5 1985) 29, 30

Traguth v. Zuck, C.A.2 (N.Y.) 1983, 710 F2d 90 32

UNITED STATES OF AMERICA v. PETER SLEIGHT, Appellant UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT 808 F.2d 1012; 1987 U.S. App. 25, 27

United States v. Bertoli, 994 F.2d 1002, 1010 (3d Cir. 1993) 24

UNITED STATES v. F. & M. SCHAEFER BREWING CO. 30
356 U.S. 227

U.S. Industries, Inc. v. Touche Ross & Co.854 F2d 123. 31

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 25

STATUTES AND RULES	PAGE NUMBER
28 USC § 1291	5, 22, 24, 26-29, 32, 33
ERISA 29 USC § 1132	4, 12, 15, 18
28 U.S.C. § 1292)	2, 24
The United States Constitution, Article III Section 2[1]	3, 36
Supreme Court Rule 10(a).	8, 19, 36
Rule 37(d)	10, 21
Rule 58	11, 30
First Judiciary Act, 21, 22, 25, 1 Stat. 73, 83, 84, 85(1789)	11, 33
OTHER	
Treaty between The United States of America and The Kingdom of Belgium	3, 13, 14, 33
24 Fair Empl. Prac. Cas. (BNA) 1608; 24 Empl.	19
Prac. Dec. (CCH) P31,230; 30 Fed. R. Serv. 2d (Callaghan) 288	19

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 973 F. Supp. 500; 994 F.Supp. 278; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 30, 1999.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 1, 2000, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ on _____ in Application No. A-____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Social Security Agreement Between The United States Of America and The Kingdom Of Belgium Article 5.1.:

Article 5

1. Unless otherwise provided in this Part or the Final Protocol, a person employed or self-employed within the territory of one of the Contracting States shall be subject only to the laws of that State even if the person resides in the territory of the other State, or if the person's employer or the offices of the employer are located in the territory of the other Contracting State.

ANNOTATIONS AND COMMENTS

Article 5.1 establishes a general territoriality rule which stipulates that ordinarily a person's work in a country will be subject to the laws on coverage of only that country. Thus, a person working in employment or self-employment covered under the laws of both countries will remain covered only under the system of the country where the work is perform and will be exempt from coverage under the system of the other country.

2. United States Constitution Article 3.2[1] power extended to treaties

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to

controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

3. 29 USC § 1132 (g)

g) Attorney's fees and costs; awards in actions involving delinquent contributions
(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

3. 29 USC § 1132 a(3)

Sec. 1132. Civil enforcement
(a) Persons empowered to bring a civil action
A civil action may be brought -
(1) by a participant or beneficiary -
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms

of the plan;

3. 28 USC § 1291

Sec. 1291. Final decisions of district courts
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

4. 28 USC § 1292

Sec. 1292. Interlocutory decisions
(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
(3) Interlocutory decrees of such district courts or the judges

thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction -

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and (2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d) (1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the

Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4) (A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The

stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.
(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

5. Supreme Court Rule 10(a).

Rule 10. Considerations Governing Review on Writ of Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an

important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

6. Rule 37(d)

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33 , after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34 , after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c) .

7. Rule 58

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b) : (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a) . Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2) , the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59 . Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course.

8. First Judiciary Act, 21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789)

STATEMENT OF THE CASE

Plaintiff commenced this action on August 21, 1995, seeking relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001-1461. Plaintiff alleges that he was employed by AFIA from June, 1971 through March, 1982 and is therefore eligible for benefits under the company's retirement plan (the "Plan"). (Compl. at 2.)
The initial demands for relief included:

> "Pursuant to 29 USCS § 1132 (a) (1)
> Redressment for unlawfully excluding the plaintiff from the AFIA Retirement Plan by reinstating all benefits due as provided by the Plan.
>
> Pursuant to 29 USCS § 1132 (g)
> Reasonable Attorney's fee and cost of suit.
>
> Pursuant to 29 USCS § 1132 (c)
> One hundred dollars per day starting on June 22, 1994, for failing to supply copies of extract from The Plan Text and Trust Agreement regarding Plan participation and any exclusions.
>
> Pursuant to 29 USCS § 1132 (a) (3)
> Punitive damages and emotional distress at one half each representing the plaintiff's contribution to AFIA for eleven years of service at the current average rate of 70,000 dollars per annum totaling 770,000 dollars.
>
> The plaintiff reserves the right to amend his demand if and when during the process of this action evidence clearly demonstrate that the defendant unlawfully and knowingly excluded the plaintiff from the Plan or caused any other

damage during his employment with AFIA."

During the discovery process, for the verification of plaintiff's employment with AFIA, at the request of the defendants the plaintiff authorized the release of US Social Security contribution statement to the defendants which clearly establishes that from October 1971 to December 1980 no US Social Security tax contribution was made from the defendants on behalf of the plaintiff; see Court Memorandum and Order dated July 17, 1996 page 5 which reads in part:

"By letter dated July 12, 1995 defendants recommended that Boyadjian authorize the release'''...The report did not show'.. between 1971 and 1982. The report showed deductions only in 1971 and then again in 1982".

Consequently, after a careful review of the wage reporting practice of AFIA's expatriate personnel and impact on future statutory retirement benefits, on September 30, 1996, the plaintiff submitted to the District Court, a motion to amend his original complaint. The articulation of the amendment reads in part:

"The plaintiff claims:

He was employed by AFIA Worldwide Insurance from June 1971 to February 1982. During this period of employment the plaintiff was assigned to the employer's Regional Control Office in Belgium.

AFIA's salary payment policy for expatriate personnel at that time, was comprised of two parts, the first part paid at the overseas post and the second part deposited in the employee's US bank account.

Wages paid at the overseas post were subject to all local taxes including Social Security.

Wages deposited in the employee's US bank account were not subjected to Social Security neither in the US nor overseas.....Wherefore, the plaintiff demands judgment for relief as follows:

Life annuity payable monthly to the plaintiff starting at his normal age of retirement in the amount equal to his monthly

benefit under the AFIA Retirement Plan considered in this action (totaling to a double benefit). ...."

By an Order dated April 21, 1997 the District Court denied the Plaintiff's motion to amend his complaint. Articulation of the basis for such an order reads in part,

"and the Court finding that plaintiff's moving papers lack clarity as they do not specifically assert the requested relief,.....his complaint is denied as futile".

The plaintiff then contacted the US Social Security Administration, Office of International Policy to request specific information regarding the requirements of wage reporting and Social Security taxes and coverage for US employers overseas personnel; in particular Article 5.1 of the US and Belgium agreement which clearly defines the responsibility of the employer regarding social security taxes and confirms the Defendants violation thereto regarding the reporting of wages for social security purposes.

After receiving the requested information from the US Social Security Administration, Office of International Policy, the plaintiff filed on July 1, 1997 a motion to reconsider amendment. See District Court records for full text of plaintiff' motion which reads in part.

"This amendment is filed pursuant to 26 USCS § 3102 Deduction of tax from wages, 26 USCS § 3111(c) Relief from taxes in cases covered by certain international agreements, and Agreement Between The United States Of America and The Kingdom Of Belgium Article 5.1 .

Article 5.1 of the US and Belgium agreement clearly defines the responsibility of the employer regarding social security taxes and confirms the Defendants violation thereto regarding the reporting of wages for social security purposes."

By an Order of the District Court dated September 2, 1997, the

Court denied the Plaintiff' motion to reconsider amendment dated July 1, 1997 "as moot".

Prior to filing suit, Plaintiff repeatedly contacted CIGNA in an effort to obtain information on his eligibility for retirement benefits.
CIGNA repeatedly asserted that it had insufficient information to support Boyadjian's claim for benefits.

By Memorandum and Order dated July 17, 1996, the Court denied without prejudice defendants' prior motion for summary judgment. (Mem. & Order dated July 17, 1996, at 12.).

After the Court denied defendants' initial motion for summary judgment, defendants determined that plaintiff was in fact a former AFIA employee and entitled to retirement benefits.

By letter dated October 23, 1996, CIGNA provided Plaintiff with the details concerning his pension benefits, and informed him that he could elect to receive benefits beginning on February 1, 1998 at age 65, or retroactively to February 1, 1995 at age 62. (Defs.' Ex. 10: Letter from Cheryl Santos-Flynn, CIGNA Senior Retirement Plans Specialist, to Plaintiff (Oct. 23, 1996).)

In support of their motion for summary judgment, defendants argue that they have determined that plaintiff is eligible for benefits under the Plan and calculated plaintiff's benefits under the Plan.
Thus, defendants assert, all of Plaintiff's claims have been rendered moot, and the Court must dismiss the action for lack of jurisdiction.

In support of his motion for summary judgment, plaintiff argues that he is entitled to: (1) attorneys' fees and the costs of suit; (2) $ 100 per day from July 29, 1993 to September 3, 1996, pursuant to 29 U.S.C. 1132(c), for defendants' failure to provide

requested information; and (3) damages for emotional distress and punitive damages. (Pl.'s Br. in Supp. of Mot. for Summ. J. at 2.) Plaintiff maintains that these claims have not been rendered moot by defendants' determination that he is entitled to pension benefits. (Pl.'s Letter Br. dated June 9, 1997.) Defendants respond that "the relief requested by plaintiff is not warranted." (Defs.' Letter Br. dated May 12, 1997.)

By an Order dated July 30, 1997, the District Court ruled on all claims except one, the Court granted the Defendants motion for summary judgment with respect to Plaintiff's claim for retirement benefits. The Court denied the Plaintiff's motion for summary judgment with respect to attorneys' fees, emotional distress and punitive damages.
Costs were granted to the plaintiff subject to the submission of a Bill of Costs within 30 days.

> "IT IS FURTHER ORDERED that plaintiff serve and file a Bill of Costs in accordance with Local Civil Rule 54.1 within 30 days of the entry of this Order."

Plaintiff filed a Bill of Costs, on August 11, 1997 for the following items:

$ 8,129.84 incurred in discovery which includes: telephone, postage, copying and time spent;
$ 14,002.20 for litigation and court action which includes amounts for telephone, postage, copying, the purchase of a computer and time spent;
$ 708.60 for travel mileage for time spent traveling to and from various libraries;
$ 119.70 for a subscription to America On-Line.
The total amount of costs is $ 23,110.34.

By an Order dated March 6, 1998, Appendix B, the District

Court addressed the last open issue in this case, Bill of Costs.

On March 11, 1998 Plaintiff filed a motion to supplement the bill of costs with 3 invoices as requested by the Court.

Most cost items were denied except the filing fee.

> "IT IS THEREFORE on this 6th day of March, 1998 ORDERED that the motion of plaintiff, Robert Boyadjian, for costs be and hereby is GRANTED IN PART AND DENIED IN PART AS FOLLOWS: (1) plaintiff's claim for reimbursement for the filing fee of $ 150.00 is GRANTED; (2) plaintiff's claims for travel, long distance telephone calls, postage, travel, computer and computer program, and "time spent" are DENIED WITH PREJUDICE and (3) plaintiff's claim for photocopying expenses is DENIED WITHOUT PREJUDICE [**14]"

On April 7, 1998, Plaintiff filed a Notice of Appeal to the District Court, from 3 orders:
First denying him a reconsideration of a motion to amend his complaint entered in this action on the 21 day of April, 1997;
Second, denying him attorney fees, emotional distress and punitive damages entered in this action on the 31 day of July, 1997;
Third denying him part of costs of suit, entered in this action on the 6 day of March, 1998.

On November 30, 1999, the Court of Appeals issued a judgment to affirm the District Court' Order entered on March 6, 1998.

> "The District Court properly granted Boyadjian reimbursement for the only cost authorized by 28 U.S.C.§ 1920; e.g. his filing fee."

The Court of Appeals also dismissed in its opinion, the appeals from the District Court Orders of April 21, 1997 and July 31,

1997 as untimely under Budinich.

> "This was a final, appealable order, as "an unresolved issue of attorneys fees [or costs]... does not prevent judgment on the merits from being final. "Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988)."

On December 11, 1999, Plaintiff submitted to the Court of Appeals, a motion for rehearing, asserting the finality issue of the July 31, 1997 Order, as being not final, as well as cost items which were denied on the basis of self representation.

> "Accordingly, because plaintiff is a pro se litigant, the Court finds that he may not recover attorneys' fees under ERISA, 29 U.S.C. 1132(g)(1)."

On February 1, 2000, the Court of Appeals, denied the motion for rehearing.

REASONS FOR GRANTING THE PETITION

The jurisdictional reason for submitting this Writ of Certiorari is defined in Supreme Court Rule 10(a).

> "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" (finality).

OTHER REASONS FOR GRANTING THE WRIT OF CERTIORARI

(A) The petitioner contends that the United States Court of Appeals for the Third Circuit has entered a decision in this case, in conflict with the decisions of other United States courts of appeals on the same important matter, the finality of district courts Orders.

The order in controversy as to its finality is the Order of the District Court filed on July 31, 1997 (Appendix C), which granted costs without defining specific amounts or types of costs. The Order also requested plaintiff to submit a bill of costs within 30 days.

The bill of costs was "under advisement of the Court" (as per Court Clerk), until resolved.

> By an Order dated March 6, 1998, Appendix B, the District Court addressed the Bill of Costs; most cost items were denied as being exclusive to attorneys or unauthorized, except the filing fee.

> "UNITED STATES COURT OF APPEALS, SECOND CIRCUIT
> 629 F.2d 828; 1980 U.S. App. LEXIS 14475; 24 Fair Empl. Prac. Cas. (BNA) 1608; 24 Empl. Prac. Dec. (CCH) P31,230; 30 Fed. R. Serv. 2d (Callaghan) 288

Lillie Bell Johnson, Marion freeman and Addie Fortson, on their own behalf Kingston and Lillie McGhee, Plaintiffs-Appellees, v. University of Bridgeport
Motion to dismiss appeal based on lateness in filing. Held that a judgment is not final and appealable for purposes of the thirty-day period for filing notice of appeal under Fed. R. App. P. 4(a) **until statutorily authorized attorneys' fees have been determined**."

"IERNA, P.Y. Costello, Inc.,... v. Arthur Murray International, Inc.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
833 F.2d 1472; 1987 U.S. App. LEXIS 16216
Whether a district court order resolving all issues in a case except an award for attorneys' fees is final and appealable **depends on the circumstances**. n3 C.I.T. Corp. v. Nelson, 743 F.2d 774, 775 (11th Cir.1984); McQurter v. City of Atlanta, 724 F.2d 881, 882 (11th Cir.1984) (citing Holmes v. J. Ray McDermott & Co., 682 F.2d 1143, 1146 (5th Cir.1982), cert. denied, 459 U.S. 1107, 103 S. Ct. 732, 74 L. Ed. 2d 956 (1983)). The test in this circuit is well established: .....
n3 This court **rejected the rule that all attorneys' fees requests are collateral to the main action** in C.I.T. Corp. v. Nelson, 743 F.2d 774, 775 n. 1 (11th Cir.1984). The court explained that such a rule is inconsistent with the Supreme Court's analysis in White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451, 102 S. Ct. 1162, 1166, 71 L. Ed. 2d 325 (1982), and "unnecessarily promotes piecemeal litigation and multiple appeals." C.I.T. Corp., 743 F.2d at 775 n. 1. .....
[*1476] When the parties contractually provide for attorneys' fees, the award is an integral part of the merits of the case. See C.I.T. Corp., 743 F.2d at 775 (guaranty agreement); see also F.H. Krear & Co. v. Nineteen Named Trustees, 776

F.2d 1563, 1564 (2nd Cir.1985) (contract); Oxford Prod. Credit Ass'n v. Duckworth, 689 F.2d 587, 588-89 (5th Cir.1982) (promissory note). n6

n6 **This court has found attorneys' fees integral to the merits in cases that do not involve contractual agreements**. See, e.g., Jaffe v. Sundowner Properties, Inc., 808 F.2d 1425, 1427 (11th Cir. 1987) (Rule 37(d) attorneys' fee sanction); Fort v. Roadway Express, Inc., 746 F.2d 744, 747-48 (11th Cir.1984) (attorneys' fees award in Title VII case). [**10]"

"Harry HOLMES, Plaintiff-Appellee, v. J. RAY McDERMOTT & COMPANY, INC.,
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
734 F.2d 1110; 1984 U.S. App. LEXIS 21140; 1985 AMC 2024

On the first appeal of this case, we held that because the trial court had not at the time of the appeal **determined the amount of the attorneys' fee award, the judgment was not final** and we did not have jurisdiction to hear the appeal.....We held, however, that in a case involving an award of attorneys' fees as part of the plaintiff's damages for the defendant's willful and arbitrary failure to pay maintenance and cure, **the fee award constituted an element of the plaintiff's damages and "was not uniquely separable from the merits but was bound hand in hand with them**." 682 F.2d at 1147. Because the amount of the award had not been set by the district court, therefore, we held that **the order appealed from was not final** and dismissed the appeal for want of jurisdiction."

(B) The petitioner contends that the United States Court of Appeals for the Third Circuit has entered a decision in this case, in conflict with the decisions of its own court of appeals

regarding finality as per USC § 1291 and untimely appeals.

"Beckwith Machinery Company, Appellee v. Travelers Indemnity Company, Appellant
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
815 F.2d 286
The procedural posture in which this case arises forces us to confront a heretofore undecided question of appellate jurisdiction for this circuit, namely, whether a district court's order awarding, but not yet quantifying, attorney's fees is a final order n1 from which an appeal may be taken when the fee award arises not as a collateral matter under a separate statutory provision, but instead results from the underlying cause of action (here a contract) which forms the basis of the dispute between the parties. **Because we conclude that the attorney's fees in this case are an integral part of the contractual relief sought by Beckwith and such fees have yet to be determined, there is no final order**. Thus, we will dismiss the appeal without reaching the merits of the dispute."

"ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation v. * BEAZER EAST, INC., a Delaware corporation; CHICAGO BRIDGE & IRON COMPANY, an Illinois corporation Beazer East, Inc., a Delaware corporation, Appellant
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
124 F.3d 551; 1997 U.S. App. LEXIS 22970; 45 ERC (BNA) 1228; 27 ELR 21510
A. General Rules of Finality
"Whether an order is 'final' depends on its effect." Marcus v. Township of Abington, 38 F.3d 1367, 1370 (3d Cir. 1994). Ordinarily, a final decision will have two effects. First, the

decision will fully resolve all claims presented to the district court. Second, after the decision has been issued, **there will be nothing further for the district court to do**. See Catlin v. United States, 324 U.S. 229, 233, 89 L. Ed. 911, 65 S. Ct. 631 (1945) ("A'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); Isidor Paiewonsky Assocs., Inc. v. Sharp Properties, Inc., 28 V.I. 448, 998 F.2d 145, 150 (3d Cir. 1993) ("A final decision is one which **disposes of the whole subject, gives all the relief that was contemplated**, provides with reasonable completeness, for giving effect to the judgment and [**11] leaves nothing to be done in the cause save to superintend, ministerially, the execution of the decree.") (emphasis and internal quotation marks omitted)). The necessary complement is, of course, that there is no final order **if claims remain unresolved and their resolution is to occur in the district court**. See, e.g., Marcus, 38 F.3d at 1367

.....

.

Instead, an appellate court must determine whether, **at the time it is examining its jurisdiction, there remain unresolved issues to be adjudicated in the district court**.....("An otherwise nonappealable order may become final for the purposes of appeal where a [party] voluntarily and finally abandons the other claims in the litigation.")."

"ISIDOR PAIEWONSKY ASSOCIATES, INC. v. SHARP PROPERTIES, INC.
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
998 F.2d 145; 1993 U.S. App. LEXIS 15145; 28 V.I. 448
Congress has granted the courts of appeals jurisdiction over appeals "from all final decisions of the district courts of the

United States . . . and the District Court of the Virgin Islands." 28 U.S.C. § 1291. In [**10] Catlin v. United States, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945), the Supreme Court defined a "final decision" for purposes of appeal "generally [as] one which ends the [*150] litigation on the merits and leaves nothing for the court to do but execute the judgment." Id. at 233, 65 S. Ct. at 633 (emphasis added). Although, typically, litigants must appeal from the substantive judgment on the merits (except cases of interlocutory appeals authorized by 28 U.S.C. § 1292), **Catlin's definition of finality explicitly applies only as a general matter, and leaves room for exceptions in appropriate situations**."

"UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
LEON M. MARTIN v. HAROLD ED BROWN

.....

Our appellate jurisdiction is generally limited to the review of final decisions of the district courts. United States v. Bertoli, 994 F.2d 1002, 1010 (3d Cir. 1993); see also 28 U.S.C.A. § 1291.9 Section 1291 states: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."A final decision is one which disposes of the whole subject, **gives all the relief that was contemplated**, provides with **reasonable completeness**, for giving effect to the judgment and leaves nothing to be done in the cause save to superintend, ministerially, the execution of the decree." Isidor Paiewonsky Associates, Inc. v. Sharp Properties, Inc., 998 F.2d 145, 150 (3d Cir. 1993) (internal brackets, quotation, emphasis and citations omitted). ..... **Generally, an order is not final until it is reduced to a determinate amount**.
Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers, 855 F.2d 1080, 1089 (3d Cir. 1988);

see also Apex Fountain Sales, Inc. v. Kleinfeld, 27 F.3d 931, 934-35 (3d Cir. 1994); United States v. Sleight, 808 F.2d 1012, 1015 (3d Cir. 1987); Becton Dickinson & Co. v. District 65, United Auto., Aerospace and Agric. Implement Workers of Am., AFL-CIO, 799 F.2d 57, 61-62 (3d Cir. 1986). **The need for quantification arises from "concerns with duplicative expenditure of judicial time and resources."** Sleight, 808 F.2d at
1015.....

[W]e have continued to recognize that an order is final even if it does not reduce the damages to a sum certain if "the order sufficiently disposes of the factual and legal issues and [if] any unresolved issues are sufficiently '**ministerial' that there would be no likelihood of further appeal**." Apex, 27 F.3d at 936 (quoting Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1544 n.52 (3d Cir. 1993)) (second alteration in original).

The court acknowledges that "the amount of this sanction remains unquantified" and that, generally, "an order is not final until it is reduced to a determinate amount" (Slip op. at 17). ..... this court held that an order establishing liability and ordering an accounting, but not quantifying the amount of money to be paid the plaintiff by the defendant, was not a final order. **We made clear that the word "ministerial" in the context of the Forgay-Conrad doctrine refers to "mechanical" acts, like mathematical calculations, about which there can be no dispute. Only when the act remaining to be done is "ministerial" in this sense can an appellate court proceed with assurance that there will "be no likelihood of [a] further appeal."** Apex, 27 F.3d at 936 (quotation omitted). We stressed the importance of the considerations behind insisting on quantification of damages, quoting from the Supreme Court's decision in Van Cauwenberghe v. Biard, 486 U.S. 517 (1988):

.....

Most important for present purposes, we noted in Apex that

this understanding of the importance of finality is "reflected in our cases holding that **a district court order awarding 'reasonable' attorneys fees is not appealable until the fees are quantified in order to prevent two appeals -- one on whether attorneys fees should be awarded and a second on the amount of the award."**
Id.....
But my concern about the court's ruling on jurisdiction is based only in part on the considerations we stressed in Apex. **Piecemeal appellate review is an inefficiency the federal judiciary can ill afford."**

"SPM CORPORATION, Appellant v. M/V MING MOON; BLUE ANCHOR LINE, division of TRANSPAC CONTAINER SYSTEM, LTD.; YANGMING MARINE TRANSPORT CORPORATION; and MAHER TERMINALS, INC.
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
965 F.2d 1297; 1992 U.S. App. LEXIS 13514; 1992 AMC 2409
Although the parties submit that we have appellate jurisdiction over a final order of the district court under 28 U.S.C. § 1291 (1988), **we disagree. Because the amount of Blue Anchor's reasonable attorney's fees has not been set, the extent of Yangming's and Maher's total liability, including indemnification of Blue Anchor, has not been determined. Accordingly, the district court's order was not final**, even though SPM's rights have been fully determined. See Vargas v. Hudson County Board of Elections, 949 F.2d 665, 668-70 (3d Cir. 1991) (**where attorney's fees are sought as part of damages, and not as prevailing party, rule of Budinich v. Becton Dickinson & Co., 486 U.S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988), does not apply**, and district court's ruling is not final until amount of fees

[**7] is fixed)."

"UNITED STATES OF AMERICA v. PETER SLEIGHT, Appellant
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
808 F.2d 1012; 1987 U.S. App. LEXIS 942; Comm. Fut. L. Rep. (CCH) P23,446
"The government has failed to direct us to any authority in support of its position that would require us to divide appellate consideration of restitution into **two separate appeals, one on the award itself and the other on the amount awarded**..... Although not controlling, we find instructive **our recent decision that a court order awarding "reasonable attorneys' fees" that has not yet been reduced to a definite amount is not a final decision** within the meaning of 28 U.S.C. § 1291. See Becton Dickinson and Co. v. United Automobile, Aerospace and Agricultural Implement Workers of America, 799 F.2d 57, 61-62 (3d Cir. 1986). The same concerns with **duplicative expenditure of judicial time and resources that underlie the finality requirement also militate against piecemeal appeals** on [**6] the restitution award. Therefore, we reject the government's contention and turn to the substance of Sleight's argument."

"UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
MICHAEL J. RAGAN v. TRI-COUNTY EXCAVATING, INC.
In Beckwith Machinery Co. v. Travelers Indem. Co., 815 F.2d 286 (3d Cir. 1987), **we held that when an award of attorney fees is based on a contractual provision and is an "integral part of the contractual relief sought," the**

order does not become final and appealable until the attorney fees are quantified. Id. at 287.
Accord Vargas v. Hudson County Bd. of Elections, 949 F.2d 665, 670 (3d Cir. 1991) (**where attorney fees are sought as part of damages, and not as prevailing party, the rule of Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988), does not apply** and the district court's ruling is not final until the amount of fees is fixed); accord SPM Corp. v. M/V Ming Moon, 965 F.2d 1297, 1300 (3d Cir. 1992).....**the district court's delay in quantifying the amount of such fees until February 15, 1995 rendered the earlier order non-final for purposes of appeal**."

(C) The petitioner contends that the United States Court of Appeals for the Third Circuit has entered a decision in this case, which departed from the judicial proceedings of the United States Supreme Court cited in its opinion and other proceedings.

In BUDINICH v. BECTON DICKINSON, cited by the Court of Appeals, the fee request was not part of the prayer in plaintiff's initial complaint, was requested by post-judgment motion therefore not part of the merits embodied in the initial complaint.

"BUDINICH v. BECTON DICKINSON & CO., 486 U.S. 196 (1988)
.....If one were to regard the demand for **attorney's fees as itself part of the merits, the analysis would not apply. The merits would then not have been concluded, and 1291 finality would not exist**. See Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737, 740-742 (1976).....
This proposition is not without some support. Some Courts of Appeals have held that the statutes creating **liability for attorney's fees can cause them to be part of the merits relief for purposes of 1291**. See, e. g., Holmes v. J. Ray McDermott & Co., 682 F.2d, at 1146; McQurter v. Atlanta,

724 F.2d 881, 882 (CA11 1984) (per curiam).
This Court itself implicitly acknowledged the possibility of such an approach in Boeing Co. v. Van Gemert, 444 U.S. 472 (1980), where, in holding that a judgment on the merits was final.....,
we expressly distinguished cases in which the plaintiff had specifically requested attorney's fees as part of the prayer in his complaint. Id., at 479-480, n. 5.

MOREY v. BARRINGTON PRESS, INC , 484 U.S. 906 (1987)
Four Circuits have held that an attorney's fee award, when that award **is not won in a collateral proceeding (such as a 1988 action), is not final until the amount of the award is quantified**. Beckwith Machinery Co., supra, at 290; F.H. Krear & Co. v. Nineteen Named Trustees, 776 F.2d 1563, 1564 (CA2 1985); Todd Shipyards Corp. v. Auto Transportation, S.A., 763 F.2d 745, 751 (CA5 1985); Fort v. Roadway Express, Inc., 746 F.2d 744, 747 (CA11 1984).

"EISEN v. CARLISLE & JACQUELIN ET AL.
SUPREME COURT OF THE UNITED STATES
Restricting appellate review to "final decisions" within the meaning of 28 USCS 1291 **prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition** of what is, in practical consequence, but a single controversy; no verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future.
APPEAL AND ERROR §22
finality of decision below -- construction of 28 USCS 1291 --
Headnote: [4]
The requirement of finality as a prerequisite of jurisdiction of

a Court of Appeals to entertain appeals from all final decisions of a federal court **is to be given a practical rather than a technical construction**; the inquiry requires some evaluation of the competing considerations underlying all questions of finality, that is, **the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other**."

"UNITED STATES v. F. & M. SCHAEFER BREWING CO.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. 356 U.S. 227
When an opinion leaves **doubtful whether the judge intended it to be his final act in the case, the clerk's notation of it in the docket cannot constitute "entry of the judgment"** within the meaning of Rule 58. P. 233. **(d) A final judgment for money must, at least, determine, or specify the means of determining, the amount**; and an opinion which does not either expressly or by reference determine the amount of money awarded **leaves doubtful whether it was intended by the judge to be his final act in the case**.Pp.233-234....."

"MOREY v. BARRINGTON PRESS, INC , 484 U.S. 906 (1987)
484 U.S. 906 .....
Four Circuits have held that an attorney's fee award, when that award is not won in a collateral proceeding (such as a 1988 action), **is not final until the amount of the award is quantified**. Beckwith Machinery Co., supra, at 290; F.H. Krear & Co. v. Nineteen Named Trustees, 776 F.2d 1563, 1564 (CA2 1985); Todd Shipyards Corp. v. Auto Transportation, S.A., 763 F.2d 745, 751 (CA5 1985); Fort v. Roadway Express, Inc., 746 F.2d 744, 747 (CA11 1984)."

(D) The petitioner contends that the United States Court of Appeals for the Third Circuit affirmed a decision in this case, in conflict with the decisions of other United States courts of appeals on the same important matter, costs.
Most cost items were denied by the District Court on the basis of self representation.

"Court's exercise of its discretionary power to authorize award of costs turns on **whether costs are for materials necessarily obtained for use in the case**. U.S. Industries, Inc. v. Touche Ross & Co., C.A.10 (Utah) 1988, 854 F2d 123."

"Trial judge has power to tax as costs **necessary and reasonable expenses incurred in discovery procedure**. Harrington v. Texaco, Inc., C.A.Tex.1964, 339 F2d 814, certiorari denied 85 S.Ct 1538, 381 U.S 915, 14 L.Ed.2d 435."

"**Cost of computer research is recoverable, within reason, and when prevailing party has not already been awarded, or has not properly requested, attorney's fees**, it is not dispositive that the expenses are sought as a cost. O'Donnell v. Georgia Osteopathic Hosp., Inc., D.C.Ga.1983, 99F.R.D. 578."

"Ray v. U.S. Dep't of Justice, 770 F.Supp. 1544 (S.D.Fla.1990).
As a prevailing party, Ray filed a motion for attorney's fees under FOIA.....
Ray sought fees for his own legal work and fees for the legal work of another lawyer who assisted him. In a comprehensive order, see Ray v. U.S. Dep't of Justice, 856 F.Supp. 1576 (S.D.Fla.1994), the district court concluded that Ray, as a **pro se plaintiff**, was entitled to no award of

attorney's fees for his own work. **The court did award Ray fees for the work of his co-counsel**. The court declined to enhance the amount of this award,
however.....

> In Cook, 6 Vet.App. at 236, the Court cited Naekel, 845 F.2d at 981, which permitted "**reimbursement of litigation expenses and costs [under] S 2412(d)(1)(A)" as not "dependent on whether [the appellant] was representing himself**". Thus, carrying over the analogy in Part II.B., above, which led us to conclude that a pro se appellant should be treated the same as a non-attorney practitioner for EAJA purposes, **a pro se appellant may be awarded EAJA expenses** pursuant to section 2412(d) because expenses of representation before us provided by a non-attorney practitioner may be awarded under the EAJA. See Merrell, supra (**actual expenses incurred are awardable under EAJA to pro se litigant**); accord Carter v. Veterans Administration, 780 F.2d 1479, 1482 (9th Cir. 1986)."

(E) Finally the petitioner is deeply convinced that this petition, if certiorari is granted, may protect and help thousands of pro se litigants from forfeiture of their important rights.

> "Implicit in right to self-representation is obligation on part of court **to make reasonable allowances to protect pro-se litigants from inadvertent forfeiture of important rights because of their lack of legal training**. Traguth v. Zuck, C.A.2 (N.Y.) 1983, 710 F2d 90.".

If Courts are to protect pro se litigants, the least that would be expected is to require all federal judges to make their intention known regarding the appealability of their decisions, in particular for pro se cases. This would also resolve in part the main objective of 28 USC § 1291, ("the most important of which are **the inconvenience and costs of piecemeal review** on the one hand and the danger of denying justice by delay on the

other" DICKINSON v. PETROLEUM CORP., 338 U.S. 507").
All three orders appealed from by plaintiff are captioned "ORDER" and are very similar in format. The order of March 6, 1998 includes the words "FOR PUBLICATION" in the upper left corner.
Although some courts used captions such as "FINAL ORDER", "JUDGMENT" or "FINAL JUDGMENT", "FINAL DECREE", unless Congress amends federal court rules to require that a final judgment, when intended by the judge, be clearly and uniformly recognized in all final and appealable decisions, many pro se litigants at large may forfeit important rights, due to their lack of legal training.
In addition, it cannot be reasonably disputed that in this case, which is a multi-claim action (international treaty and ERISA); had the plaintiff immediately appealed all individual district court orders which appeared unjust to a lay person, there would have been three appeals; first, the April 21, 1997, Order denying an amendment regarding a violation of United States and Belgium treaty; second, the July 31 1997, Order regarding the denial of emotional and punitive damages and costs; and third, the March 6, 1998, Order regarding the denial of most costs except the filing fee.
This would not accomplish 28 USCS § 1291' primary objective.

In petitioner's opinion, denying justice by delay in not applicable in this case; all rights can be combined in one appeal without denying justice to any party.

> "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of nisi prius proceedings **await their termination by final judgment**. First Judiciary Act, 21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789); see McLish v. Roff, 141 U.S. 661."

According to the U.S. Census Bureau, 62 percent of the U.S. households have a total money income between $15.000 and

$75,000.
To obtain Legal Aid Societies assistance the maximum income threshold varies depending on the State and County between $13,000 to $15,000.
The petitioner contends that about two third of the U.S. population is too wealthy to get free legal assistance and less fortunate to find an attorney at a reasonable cost, in particular for long lasting federal litigations. As a result the number of pro-se litigations are increasing in the United States.
Although Congress indirectly addressed this portion of the population by enacting the Equal Access to Justice Act, the emphasis of the Act was cases where the government was a party and shifting of costs, not the middle class population's difficulty in obtaining defense at an affordable cost when the outcome of a case is never known in advance: also the Act does not resolve the loss by forfeiture of important rights for pro-se litigants, in particular untimely appeals.
Equal Access to Justice Act' (Public Law 96-481) reinstated by Congress in 1985 which reads in part:

> "With the enactment of this measure, the legal field would be leveled. **Now those with modest means would have an equal access to the judicial process.**"

Finality of judgment was not always recognized by lawyers for two centuries; this is even more so for pro se litigants.

"Half a century ago this Court lamented, "Probably no question of equity practice has been the subject of more frequent discussion in this court **than the finality of decrees**. . . . The cases, it must be conceded, are not altogether harmonious." McGourkey v. Toledo & Ohio Cent. R. Co., 146 U.S. 536, 544-45. This lamentation is equally fitting to describe the intervening struggle of the courts; sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the **inconvenience and costs of piecemeal review** on the one hand and the danger of denying justice by delay on the other.
DICKINSON v. PETROLEUM CORP., 338 U.S. 507 (1950)."

CONCLUSION

It is respectfully submitted that petitioner has duly established under Rule 10 that there are important reasons why the writ should be granted. The Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court and other Courts of Appeals on the same matter, (finality). The Court of Appeals decided a federal question in a way to conflict with applicable decisions of its own court on the same matter, (finality).

The Court of Appeals affirmed a federal question (costs) in a way which discriminates against pro se litigants, is not statutory and conflicts with the principle of the Equal Access to Justice Act of Congress and the United States Constitution' XIV amendment's equal protection clause.

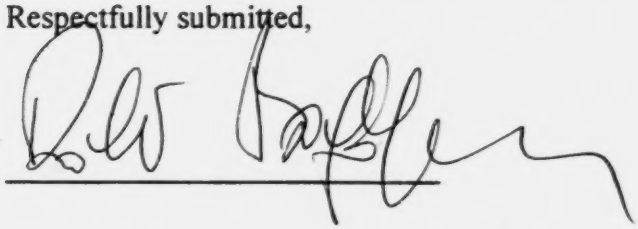
The decision of the Court of Appeals should be reversed

The petitioner is deeply convinced that granting this writ will help in some way the thousands of future self represented litigants at risk by **supplementing the United States Constitution' XIV amendment regarding "equal protection of the laws"**.

Granting this writ should also deter employers in wrongfully denying benefits to future ERISA participants and beneficiaries.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: April 24, 2000

APPENDICES

UNITED STATES COURT OF APPEALS JUDGMENT
AND OPINION
DATED, THE 30th DAY OF NOVEMBER, 1999

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 98-5191
ROBERT BOYADJIAN, Appellant V. CIGNA COMPANIES; AFIA WORLDWIDE INSURANCE; CIGNA AFIA RETIREMENT PLAN ADMINISTRATOR
On Appeal from the United States District Court
for the District of New Jersey (D.C. Civil No. 95-cv-04453)
District Judge: Hon. Mary Little Cooper
Submitted Under Third Circuit LAR 34.1(a) November 2, 1999
Before: BECKER, Chief Judge, MCKEE and COWEN, CIRCUIT JUDGES

JUDGMENT

This case came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a).
On consideration whereof, it is now here

ORDERED AND ADJUDGED by this court that the judgment of the District Court entered March 6, 1998, be and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
signature
Clerk

DATED: NOV 30 1999

APPENDIX A

UNREPORTED - NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT No. 98-5191
ROBERT BOYADJIAN, Appellant V.CIGNA COMPANIES; AFIA WORLDWIDE INSURANCE; CIGNA AFIA RETIREMENT PLAN ADMINISTRATOR
On Appeal from the United States District Court for the District of New Jersey (D.C. Civil No. 95-cv-04453)
District Judge: Hon. Mary Little Cooper
Submitted Under Third Circuit LAR 34. 1 (a) November 2, 1999 Before: BECKER, Chief Judge, MCKEE and COWEN, CIRCUIT JUDGES (Filed NOV 30 1999)
OPINION PER CURIAM

Robert Boyadjian filed a notice of appeal on April 7, 1998, seeking review of three orders of the District Court: one entered April 21, 1997 denying him reconsideration of a motion to amend; another entered July 31, 1997 denying him damages for emotional distress, punitive damages, and attorney fees; and a third, denying in part his request for costs.

A notice of appeal in a civil case in which the United States is not a party must be filed within 30 days of the date of entry of the judgment or order appealed. Rule 4(a)(1), Fed. R. App. Pro. The time periods prescribed for filing a notice of appeal are "mandatory and jurisdictional." Browder v. Director of Dep't of Corrections, 434 U.S. 257, 264 (1978). The order filed on April 21, 1997 was not a final order, but the District Court ruled on the merits on July 31, 1997, leaving nothing to be decided but the award of costs. This was a final, appealable order, as "an unresolved issue of attorneys fees [or costs] ... does not prevent judgment on the merits from being final." Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988). Unlike the statutory penalty, Boyadjian's award of costs was not compensation for his injury, and thus, under Budinich, was not part of the merits of the underlying action. Id. at 199-201. Because Boyadjian failed to appeal within 30 days from the July 3 V order, his appeal with respect to the merits of that decision, and the previous decision of April 21, 1997, will be dismissed as untimely. See generally Fincher v. Keller Industries, Inc., 905 F.2d 691 (3d Cir. 1990) (dismissing for lack of jurisdiction where appellant failed to appeal underlying merits within statutory time period but rather waited until his post-judgment motion for costs was resolved).

We do, however, have jurisdiction over Boyadjian's appeal from the order of March 6, 1998. That order resolved all issues concerning Boyadjian's motion for costs, save one: the District Court denied without prejudice Boyadjian's motion for costs

with respect to his photocopying expenses. To this extent, it was not a final order. See eg. Borelli v. City of Reading, 532 F.2d 950, 951-952 (3d Cir. 1976) (per curiam) (an order dismissing a complaint without prejudice is not a final or appealable order under 28 U.S.C. § 1291 unless "the plaintiff cannot amend the complaint or declares his intention to stand on his complaint"). Rather than follow the Court's directive and submit a bill of costs for photocopying expenses, on March 11', 1998, Boyadjian filed a motion explicitly waiving this issue. At that point, the order became final, as there were no longer any outstanding issues. Boyadjian subsequently filed a notice of appeal on April 7, 1998, within 30 days of March 11 th. Thus, we may reach the issues relating to the costs denied by the March 6th order.

A district court's taxation of costs is reviewed for abuse of discretion. See Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 334-35 (5' Cir. 1995).

---

[1] The District Court entered an order on May 8, 1998 denying the March 11' submission. Arguably, this is when the March 6' order became final. Although Boyadjian's notice of appeal would then have been premature, it would have been treated as an appeal from the final order once that order had been entered. See CAVe May Greene, Inc. v. Warren, 698 F.2d 179, 185 (3d Cir. 1983).

In awarding costs to a prevailing party, a district court cannot award any costs not authorized by statute. Id. In his Motion for Costs, Boyadjian requested compensation for several categories of costs: (1) filing fee; (2) telephone costs; (3) postage; (4) photocopying; (5) computer and online services costs; (6) "time spent," i.e., research and preparation; and (7) travel costs. The District Court properly granted Boyadjian reimbursement for the only cost authorized by 28 U.S.C. § 1920; e.g., his filing fee. The District Court properly determined that it was not authorized to reimburse Boyadjian's other expenses.

For the foregoing reasons, the judgment of the District Court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

DISTRICT COURT OPINION AND ORDER FILED,
THE 6 DAY OF MARCH, 1998

ROBERT BOYADJIAN, Plaintiff, v. CIGNA COMPANIES, AFIA WORLDWIDE INSURANCE, and CIGNA'S AFIA RETIREMENT PLAN ADMINISTRATOR, Defendants.
CIVIL ACTION NO: 95-4453 (MLP)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
994 F. Supp. 278; 1998 U.S. Dist. LEXIS 2679

March 6, 1998, Decided
March 6, 1998, Original Filed
DISPOSITION: [**1] Motion of plaintiff Robert Boyadjian for costs GRANTED IN PART AND DENIED IN PART.

CORE TERMS: Local Rule, time spent, travel, postage, filing fee, telephone, photocopying, expenditure, discovery, summary judgment, recoverable, spent, legal research, pro se, eligibility, clerk, reimbursement, subscription, verified, copying, entitled to recover, long distance, computerized, exemplification, disbursements, reimbursed, eligible, total amount, preparation, photocopies

COUNSEL: ROBERT BOYADJIAN, Pro se, Somerset, New Jersey.

For defendants: JANETTA D. MARBREY, ESQUIRE, Law Offices of K. Ruth Larson, New Brunswick, New Jersey.

JUDGES: MARY LITTLE PARELL, United States District Judge.
OPINION BY: MARY LITTLE PARELL

OPINION: [*279] MEMORANDUM OPINION

PARELL, District Judge

This matter is before the Court on motion by plaintiff pro se Robert Boyadjian ("Boyadjian") for costs pursuant to Local Rule 54.1. For the reasons expressed in this Memorandum Opinion, plaintiff's motion is granted in part and denied in part.

APPENDIX B

BACKGROUND

The facts underlying the instant action are set forth in detail in this Court's Opinion filed July 29, 1997. In the interest of clarity, we will briefly restate them here. Plaintiff commenced this action on August 21, 1995, seeking relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. Boyadjian alleged that he was employed by defendant AFIA Worldwide Insurance ("AFIA") from June, 1971 through March, 1982 and was therefore eligible for benefits under the company's retirement plan (the "Plan"). [**2] (Compl. at 2.) Initially, CIGNA Companies ("CIGNA") took the position that plaintiff did not establish his eligibility under the Plan. By Memorandum and Order dated July 17, 1996, the Court denied without prejudice defendants' motion for summary judgment, finding that there was a genuine issue of material fact as to whether plaintiff was employed by AFIA for the ten years required to become eligible for retirement benefits. (Mem. & Order dated July 17, 1996.) After the Court denied defendants' initial motion for summary judgment, defendants determined that plaintiff was entitled to benefits under the Plan, and so informed Boyadjian.

Subsequently, the parties filed cross-motions for summary judgment. Defendants sought dismissal of plaintiff's claims for lack of jurisdiction, arguing that their actions in informing plaintiff of his eligibility and rights under the plan rendered plaintiff's claims moot. Plaintiff moved for summary judgment, arguing that he was entitled to: (1) attorney's fees and costs related to this suit; (2) $ 100 per day from July 29, 1993 to September 3, 1996, pursuant to 29 U.S.C. § 1132(c), for defendants' failure to provide requested information concerning the [**3] Plan; and (3) damages for emotional distress and punitive damages. (Pl.'s Br. in Supp. of Mot. for Summ. J. at 2.) By an Opinion dated July 29, 1997, the Court granted the motions in part and denied them in part. See Boyadjian v. Cigna Corp., 973 F. Supp. 500 (D.N.J. 1997). With respect to plaintiff's attorney's fee request, the Court denied plaintiff's application, holding that pro se plaintiffs are not entitled to recover attorney's fees under ERISA, 29 U.S.C. § 1132(g)(1). The Court stated, however, that plaintiff was entitled to "litigation costs reasonably incurred." Id. at 503. The Court directed plaintiff to submit "a Bill of Costs in accordance with Local Civil Rule 54.1. within 30 days of the entry of the Order"

accompanying the Opinion. Id.

Plaintiff filed his Bill of Costs with the Court on August 11, 1997. In it, plaintiff seeks the following amounts: (1) $ 150.00 paid as a filing fee; (2) $ 8,129.84 incurred in "discovery" (which includes amounts for telephone, postage, copying and "time spent"); (3) $ 14,002.20 for "litigation and court action" (which includes amounts for telephone, postage, copying, the purchase of a computer and "time spent"; (4) $ 708.60 [**4] for travel mileage for time spent traveling to and from various libraries; and (5) $ 119.70 for a subscription to America On-Line. The total amount of costs is $ 23,110.34. n1 Plaintiff indicates that "time spent refers to preparation of motions, oppositions, legal research, reading, internet lookup of House of Representative Law Library and LEXIS-NEXIS Law Library, etc." (Pl.'s Bill of Costs.) Plaintiff has not submitted to the Court any verification of these amounts, and has not provided any receipts in support of his application.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 Plaintiff states in his Bill of Costs that the total amount sought is $ 22,960.34. It appears, however, that plaintiff miscalculated that amount by failing to include the $ 150.00 filing fee.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

Defendants oppose plaintiff's motion, arguing that (1) various expenses listed in the Bill of Costs cannot be awarded pursuant to 28 U.S.C. § 1920 and (2) charges for "time spent" are in essence, attorney's fees. (Defs.' Ltr. Br. at 1-2.)

DISCUSSION

29 U.S.C. § 1132(g) [**5] provides that in "any action under this subchapter . . . by a participant, [*280] beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). By its terms, § 1132(g)(1) does not specifically state what costs are to be awarded under the statute. However, the Supreme Court has held that a court may not shift costs beyond those found in § 1920 and § 1821 (not applicable here) without express statutory authority to do so. West Virginia Univ.

Hosps., Inc. v. Casey, 499 U.S. 83, 86, 113 L. Ed. 2d 68, 111 S. Ct. 1138 (1991); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 444-45, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987). Thus, we must turn to 28 U.S.C. § 1920, which provides that a judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket [**6] fees under section 1923 of this title;
(6) Compensation of court appointed expert, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

Local Rule 54.1(g) provides the general rules to be followed by the Clerk of the Court in awarding costs under the Local Rules. Local R. 54.1(g). The guidelines found in Rule 54.1(g) are similar to those found is 28 U.S.C. § 1920.

We also note that Local Rule 54.1(b) requires the Bill of Costs to:

precisely set forth each item thereof, so that the nature of the charge can be readily understood, and shall be verified by the attorney for the applicant, stating that (1) the items are correct, (2) the services were actually and necessarily performed, and (3) the disbursements were incurred in the action or proceeding. Counsel shall append to the verified Bill of Costs copies of all invoices in support of the request for each item.

Local R. 54.1(b). When the party seeking costs fails to comply with Local Rule 54.1(b), the costs are waived.

The initial question presented is whether plaintiff has waived his right to costs by [**7] failing to comply with Local Rule 54.1(b), which requires a verified Bill of Costs and receipts for the amounts claimed to have been spent on each expenditure. While we recognize that plaintiff has failed to comply with Local Rule 54.1(b), plaintiff's pro se status evokes the concern that a "misstep . . . may be decisive to the outcome" of his

claim for costs. Heyl v. Patterson Int'l v. F.D. Rich Housing, 663 F.2d 419, 427 (3d Cir. 1981). Thus, we will entertain plaintiff's motion at this time. However, in order to determine whether plaintiff is entitled to recover costs for the items designated in the Bill of Costs, the Court finds it necessary to address each expenditure individually.

A. Photocopying Expenses

Plaintiff seeks a total of $ 78.30 for photocopying expenses. To be recoverable as taxable costs, photocopying expenses must have been incurred for copies that were "necessarily obtained for use in the case." 28 U.S.C. § 1920(4). These costs are taxable under 28 U.S.C. § 1920 even if the documents are not offered into evidence at trial. See Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc., 920 F.2d 587, 588 (9th Cir. 1990); Illinois v. Sangamo [**8] Constr. Co., 657 F.2d 855, 867 (7th Cir. 1981); see also Hurley v. Atlantic City Police Dept., 1996 U.S. Dist. LEXIS 14088, No. 93-260, 1996 WL 549298, at *3 (D.N.J. Sept. 17, 1996). Local Rule 54.1(g) provides that

fees for exemplification and copies are taxable when (A) the documents are admitted into evidence or necessarily attached to a document required to be filed and served in support of a dispositive motion, and (b) they are in lieu of originals which are not introduced at the request of opposing counsel.

[*281] Local R. 54.1(g)(9). Here, plaintiff has failed to submit invoices documenting his copying expenses. It is clear that the photocopies under the heading of "discovery" would not be recoverable pursuant to Local Rule 54.1(g)(9). However, it is unclear whether the photocopies under the heading "litigation and court action" fall within the category of expenses which are recoverable as costs pursuant to § 1920. (See Pl.'s Bill of Costs.) Rather than engage in speculation, and in light of plaintiff's pro se status, we will deny this portion of plaintiff's application without prejudice at this time. The Court directs plaintiff to submit any receipts or other documentation which [**9] demonstrate his entitlement to reimbursement for his photocopying expenses pursuant to § 1920 and Local Rule 54.1(g) within 30 days of the Order accompanying this Memorandum Opinion.

B. Telephone Calls Made in the Course of Discovery and Litigation.

Plaintiff seeks a total of $ 50.50 which he claims he spent in making telephone calls. Long distance phone calls may be charged as part of attorney's fees, but not costs. See Abrams v. Lightolier, 50 F.3d 1204, 1225 (3d Cir. 1995); see also Ezelle v. Bauer Corp., 154 F.R.D. 149, 155 (S.D. Miss. 1994). Moreover, neither Local Rule 54.1(g) nor § 1920 permit recovery of long distance telephone expenditures. Thus, plaintiff may not recover his telephone expenses. See Crawford Fitting, 482 U.S. at 444.

C. Postage Spent in the Course of Discovery and Litigation

Plaintiff seeks $ 168.24 in postage used during discovery and in litigation of this action. Postage costs are not listed in § 1920, and are not mentioned in Local Rule 54.1(g). Moreover, expenses for postage are reimbursable as part of attorney's fees. See Abrams, 50 F.3d at 1225; Hurley, 1996 U.S. Dist. LEXIS 14088, 1996 WL 54928 at *4. Because we have determined that plaintiff [**10] is not entitled to attorney's fees, he cannot recover amounts spent on postage.

D. Travel Fees

Plaintiff claims that he spent $ 708.60 on travel to and from various libraries to prepare his motions and discovery responses. (Pl.'s Bill of Costs.) Travel expenses of attorneys are not a taxable cost. See Abrams, 50 F.3d at 1225 (traveling costs are part of attorney's fee award); Wahl v. Carrier Mfg. Co. Inc., 511 F.2d 209, 216 (7th Cir. 1975); Walters v. President and Fellows of Harvard College, 692 F. Supp. 1440, 1442 (D. Mass. 1988) (successful litigant in diversity action could not recover travel, parking and miscellaneous expenses incurred by her attorney). Moreover, Local Rule 54.1(g) and § 1920 provide that only mileage fees for witnesses to travel to the courthouse and attend depositions are recoverable as costs. See 28 U.S.C. § 1920; Local R. 54.1(g). Because there is no provision which provides that travel expenses of attorneys or litigants are taxable costs, plaintiff cannot recover these amounts. See Crawford Fitting, 482 U.S. at 444.

E. Purchase of Computer, Computerized Legal Research and Six-Month Subscription to America On-Line. [**11]

Computerized legal research is not independently taxed as a cost under 28 U.S.C. § 1920, but such expenses are considered part of attorney's fees. See Hurley, 1996 U.S. Dist. LEXIS 14088,

1996 WL 549298, at *4-5. It should be noted that a case decided by the Third Circuit states that computerized legal research is assessable as a reasonable cost of litigation. See Wehr v. Burroughs Corp., 619 F.2d 276, 285 (3d Cir. 1980). The court in Wehr relied on a theory that a court has discretion to award costs which are not specifically allowed by statute pursuant to Rule 54 of the Federal Rules of Civil Procedure. Wehr can no longer be considered good law on this point, however, in light of the Supreme Court's most recent pronouncements in Crawford Fitting and West Virginia Hospitals. The Supreme Court rejected the reasoning in Wehr and held that a court may only asses those costs which are specifically outlined in § 1920. Crawford Fitting, 482 U.S. at 441; West Virginia Hosps., 499 U.S. at 93; see also Neyer, Tiseo & Hindo, Ltd. v. Russell, 1994 U.S. Dist. LEXIS 5614, No 92-2983, 1994 WL 158917 (E.D. Pa. Apr. 29, 1994) (recognizing implicit overruling of Wehr).

[*282] Applying the same reasoning to plaintiff's [**12] request for reimbursement for the purchase of a computer and an America On-Line subscription, such expenses are not taxable as costs. See Crawford Fitting, 482 U.S. at 444 ("Any argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede those section ignores our longstanding practice of construing statutes in pari materia.").

F. "Time Spent"

Plaintiff claims that he should be reimbursed $ 21,015.00 for "time spent" during discovery and litigation of this matter. Plaintiff notes that "time spent refers mostly to search for records or documents to prove employment and eligibility to pension . . . preparation of motions, oppositions, legal research, and internet lookup." (Pl.'s Bill of Costs.) This claim clearly falls within the realm of attorney's fees. See Abrams, 50 F.3d at 1225. However, we have already determined that plaintiff may not recover attorney's fees. See Boyadjian, 973 F. Supp. at 503.

G. Filing Fee

Section 1920 and Local Rule 54.1(g) permit the recovery of plaintiff's filing fee of $ 150.00. See 28 U.S.C. § 1920(1); Local R. [**13] 54.1(g)(1).

CONCLUSION

We have found that plaintiff is entitled to be reimbursed for the $ 150.00 filing fee incurred in instituting this action. We have also stated that plaintiff's expenditures for photocopying may fall within the costs allowable under § 1920 and Local Rule 54.1., but that the record at present does not provide sufficient information for us to make that determination. As to plaintiff's remaining expenditures, we have determined that § 1920 does not authorize plaintiff's recovery of those amounts. An appropriate Order accompanies this Memorandum Opinion.

ORDER

For the reasons expressed in the accompanying Memorandum Opinion,

IT IS THEREFORE on this 6th day of March, 1998 ORDERED that the motion of plaintiff, Robert Boyadjian, for costs be and hereby is GRANTED IN PART AND DENIED IN PART AS FOLLOWS: (1) plaintiff's claim for reimbursement for the filing fee of $ 150.00 is GRANTED; (2) plaintiff's claims for travel, long distance telephone calls, postage, travel, computer and computer program, and "time spent" are DENIED WITH PREJUDICE and (3) plaintiff's claim for photocopying expenses is DENIED WITHOUT PREJUDICE [**14] ; and

IT IS FURTHER ORDERED that plaintiff submit the additional information as directed by the Court in accordance with the foregoing discussion within 30 days of this Order; and

IT IS FURTHER ORDERED that defendants remit $ 150.00 to plaintiff within 30 days of this Order.

MARY LITTLE PARELL

United States District Judge

DISTRICT COURT OPINION AND ORDER FILED, THE 31 DAY OF JULY, 1997

973 F. Supp. 500, *; 1997 U.S. Dist. LEXIS 11089, **
ROBERT BOYADJIAN, Plaintiff, v. CIGNA COMPANIES, AFIA WORLDWIDE INSURANCE, and CIGNA'S AFIA RETIREMENT PLAN ADMINISTRATOR, Defendants.
CIVIL ACTION NO: 95-4453 (MLP)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
973 F. Supp. 500; 1997 U.S. Dist. LEXIS 11089

July 30, 1997, Decided
July 30, 1997, ORIGINAL FILED
DISPOSITION: [**1] Defendants' motion for summary judgment granted in part and denied in part, and plaintiff's motion for summary judgment granted in part and denied in part.

CORE TERMS: pro se, summary judgment, administrator, beneficiary, emotional distress, punitive damages, retirement benefits, statutory penalty, trust agreement, booklet, employee benefit plan, failure to provide, eligible, furnish, requested information, moving party, eligibility, summarizing, calculation, preempted, assessing, pension benefits, rendered moot, Local Civil Rule, genuine issue of material fact, emotional distress claim, justiciable controversy, reasonably incurred, failure to respond, relief requested

COUNSEL: APPEARANCES

ROBERT BOYADJIAN, PRO SE, Somerset, New Jersey.

JANETTA D. MARBREY, ESQUIRE, Law Offices of K. Ruth Larson, New Brunswick, New Jersey, (Attorney for defendants).

JUDGES: MARY LITTLE PARELL, United States District Judge

OPINION BY: MARY LITTLE PARELL

OPINION: [*501] OPINION

PARELL, District Judge

This matter is before the Court on cross-motions for summary judgment n1 by defendants CIGNA Companies ("CIGNA"), AFIA Worldwide Insurance ("AFIA"), n2 and CIGNA's AFIA Retirement Plan Administrator (the "Administrator"); and by plaintiff pro se Robert Boyadjian ("Boyadjian"). For the reasons stated in this Opinion, defendants' motion for summary judgment is granted in part and denied in part, and plaintiff's motion for summary [*502] judgment is granted in part and denied in part.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Defendants' Notice of Motion, proposed order, and the cover page of their brief all indicate that defendants have filed a motion for summary judgment, and the motion has been docketed as such by the Clerk's Office. In the body of their moving brief, however, defendants purport to seek judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). (See Defs.' Br. in Supp. of Mot. for Summ. J. at 1, 3, 8, 10.) Because the majority of defendants' papers identify the motion as a summary judgment motion and because defendants rely on a number of documents outside the pleadings, the Court treats the motion as a motion for summary judgment. [**2]

n2 AFIA was acquired by CIGNA on January 30, 1984. (Defs.' Br. in Supp. of Mot. for Summ. J. at 3.)

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

BACKGROUND n3

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 For a detailed recitation of the events which preceded the filing of the Complaint, see the Court's Memorandum and Order dated July 17, 1996.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Plaintiff commenced this action on August 21, 1995, seeking relief under the Employee Retirement Income Security Act of

1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. Boyadjian alleges that he was employed by AFIA from June, 1971 through March, 1982 and is therefore eligible for benefits under the company's retirement plan (the "Plan"). (Compl. at 2.) Prior to filing suit, Boyadjian repeatedly contacted CIGNA in an effort to obtain information on his eligibility for retirement benefits. (See Mem. & Order dated July 17, 1996, at 2-6; Defs.' Ex. 1: Letter from Boyadjian to CIGNA (July 29, 1993); Defs.' Ex. 5: Letter from Boyadjian to Hildy Pepper, CIGNA Benefits [**3] Analyst (Oct. 26, 1993).) Although it sent Boyadjian a booklet summarizing the Plan after his second request, CIGNA repeatedly asserted that it had insufficient information to support Boyadjian's claim for benefits. (See Mem. & Order dated July 17, 1996, at 2; Defs.' Ex. 6: Letter from Marian Walter, CIGNA Senior Retirement Plans Specialist, to Boyadjian (Aug. 31, 1994) ("There is no information to indicate that you have a benefit due you. Since we have no records indicating that you are eligible for a CIGNA pension, we must assume that you did not meet the requirements necessary to obtain a vested pension benefit.").)

By Memorandum and Order dated July 17, 1996, the Court denied without prejudice defendants' prior motion for summary judgment. (Mem. & Order dated July 17, 1996, at 12.) The Court determined that two genuine issues of material fact precluded the entry of summary judgment in favor of defendants: (1) whether Boyadjian was employed by AFIA; and (2) whether Boyadjian was employed by AFIA for the ten years required to become eligible for retirement benefits. (Id. at 8.) The Court also found that plaintiff's attempts to obtain retirement benefits satisfied ERISA's [**4] requirement that a plaintiff exhaust the remedies available under the benefit plan before filing suit. (Id. at 11.)

After the Court denied defendants' initial motion for summary judgment, defendants determined that plaintiff was in fact a former AFIA employee and entitled to retirement benefits. By letter dated October 23, 1996, CIGNA provided Boyadjian with the details concerning his pension benefits, and informed him that he could elect to receive benefits beginning on February 1, 1998 at age 65, or retroactively to February 1, 1995 at age 62. (Defs.' Ex. 10: Letter from Cheryl Santos-Flynn, CIGNA Senior Retirement Plans Specialist, to Boyadjian (Oct. 23, 1996).)

DISCUSSION

A court shall enter summary judgment when the moving party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue of material fact exists. Jersey Cent. Power & Light Co. v. [**5] Township of Lacey, 772 F.2d 1103, 1109 (3d Cir. 1985), cert. denied, 475 U.S. 1013, 89 L. Ed. 2d 305, 106 S. Ct. 1190 (1986). The opposing party cannot rest on mere allegations; rather, it must present actual evidence that creates a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (quotation omitted); Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Issues of fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In support of their motion for summary judgment, defendants argue that they have: (1) determined that plaintiff is eligible for benefits under the Plan; (2) calculated plaintiff's benefits under the Plan; (3) instructed plaintiff on the elections he must make concerning [*503] his benefits; and (4) provided plaintiff with a copy of the Plan. (Defs.' Br. in Supp. of Mot. for Summ. J. at 4.) Thus, defendants assert, all of Boyadjian's claims have been rendered moot, and this Court must dismiss the action for lack of [**6] jurisdiction. (Id. at 4, 9.)

The federal judicial power extends only to "cases" or "controversies." U.S. Const. art. III, § 2. The "case or controversy" requirement demands that "a cause of action before a federal court present a 'justiciable' controversy, and 'no justiciable controversy is presented . . . when the question sought to be adjudicated has been mooted by subsequent developments." Lusardi v. Xerox Corp., 975 F.2d 964, 974 (3d Cir. 1992) (quoting Flast v. Cohen, 392 U.S. 83, 95, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968)). Article III requires that a plaintiff's claim "be live not just when he first brings the suit but throughout the entire litigation, and once the controversy ceases to exist the court must dismiss the case for lack of jurisdiction." Id. (citations omitted).

Here, plaintiff has obtained the primary relief sought in the Complaint: namely, pension benefits under the Plan. As Boyadjian concedes, no justiciable controversy remains as to this claim. (See Pl.'s Letter Br. dated June 9, 1997 ("Reinstatement of benefits under the AFIA Plan has been rendered moot since October, 1996.").) Accordingly, because the controversy over Boyadjian's entitlement [**7] to retirement benefits has ceased to exist, the Court shall grant defendants' motion for summary judgment with respect to this claim.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In support of his motion for summary judgment, plaintiff argues that he is entitled to: (1) attorneys' fees and the costs of suit; (2) $ 100 per day from July 29, 1993 to September 3, 1996, pursuant to 29 U.S.C. § 1132(c), for defendants' failure to provide requested information; and (3) damages for emotional distress and punitive damages. (Pl.'s Br. in Supp. of Mot. for Summ. J. at 2.) Boyadjian maintains that these claims have not been rendered moot by defendants' determination that he is entitled to pension benefits. (Pl.'s Letter Br. dated June 9, 1997.) Defendants respond that "the relief requested by plaintiff is not warranted." (Defs.' Letter Br. dated May 12, 1997.) The Court will address each of plaintiff's three claims in turn.

A. Attorneys' Fees and Costs

Plaintiff seeks to recover attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g). (See Pl.'s Letter Br. dated May 24, 1997.) Boyadjian claims that he has spent 450 hours litigating this action. (Id. [**8]) Defendants "object to plaintiff's request for attorneys fees and costs of suit as plaintiff has instituted this action pro se," but do not cite any authority for the proposition that a prevailing pro se litigant cannot recover attorneys' fees in an ERISA action. (See Defs.' Letter Br. dated May 12, 1997, at 1.)

29 U.S.C. § 1132(g) provides that in "any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). The Court's research has not revealed any case law on a pro se litigant's entitlement to attorneys' fees in an ERISA action.

The Court of Appeals for the Third Circuit has held, however, that pro se litigants may not recover attorneys' fees under 42

U.S.C. § 1988. Pitts v. Vaughn, 679 F.2d 311, 313 (3d Cir. 1982). The court found that Congress

did not intend to award non-lawyer, pro se litigants an equivalent of attorney's fees. Instead, Congress was concerned with reimbursing prevailing parties for the actual expenses of representation by an attorney because it recognized that attorney's fee [**9] awards are often essential to enable private citizens to protect their civil rights in the courts.

Id. at 312. The Third Circuit has also held that pro se litigants may not be awarded attorneys' fees under the Freedom of Information Act ("FOIA"). Cunningham v. F.B.I., 664 F.2d 383, 388 (3d Cir. 1981); see also Carter v. Veterans Admin., 780 F.2d 1479, 1481 [*504] (9th Cir. 1986) ("We hold that a pro se litigant may not recover attorney's fees under the FOIA. . . . We have held that a pro se litigant is not entitled to attorney's fees under analogous provisions of the Truth in Lending Act, 15 U.S.C. § 1640(a), on the ground that no financial expenditure had been made for an attorney's services."); Bollitier v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers, 735 F. Supp. 623, 627 (D.N.J. 1989) (concluding that a pro se plaintiff can never recover attorneys' fees under the Labor-Management Reporting and Disclosure Act).

ERISA provides that either party may recover a reasonable "attorney's fee." 29 U.S.C. § 1132(g)(1). The statute thus contemplates that fees may be awarded when a litigant retains an attorney and incurs legal fees. See [**10] Merrell v. Block, 809 F.2d 639, 642 (9th Cir. 1987) ("'Fees' are specifically defined in the statute as 'reasonable attorney fees.' This choice of terminology, standing alone, leads to the conclusion that Congress intended that an attorney have been retained for a prevailing pro se litigant to recover attorneys fees under the [Equal Access to Justice Act]."). As the Court of Appeals for the Seventh Circuit reasoned in the context of the FOIA:

The term "attorney fees" contemplates that the services of an attorney be utilized. The simple language of the statute controls. Attorney means attorney. We have no doubt that Blue Cross/Blue Shield would balk at a request for doctor fees from a person who removed his own appendix, or more realistically, a request for dental fees from someone who extracted his own tooth. No one would be entitled to reimbursement for therapist fees for attempts at self-improvement or for finding solutions to one's own problems. Rebuilding and repairing one's own car

after an accident might be spiritually rewarding, however, we doubt very much if one's insurance company would honor a demand for mechanic fees. Myriad examples leap to mind that need [**11] not be repeated here. Suffice it to say that, although a pro se litigant often times performs exactly the same functions as a lawyer might in representing a client, without a degree and admission to the bar a pro litigant is not entitled to collect attorney fees. We do not mean to imply that pro se litigants do not further the purposes of FOIA, we merely conclude that, had Congress intended for pro se litigants to be entitled to some type of attorney fee award, they would have made that clear in the statute.

DeBold v. Stimson, 735 F.2d 1037, 1042-43 (7th Cir. 1984). Accordingly, because plaintiff is a pro se litigant, the Court finds that he may not recover attorneys' fees under ERISA, 29 U.S.C. § 1132(g)(1).

Although plaintiff may not recover attorneys' fees, he may recover litigation costs reasonably incurred. See Cunningham, 664 F.2d at 387 n.4; Carter, 780 F.2d at 1482; DeBold, 735 F.2d at 1043 (citing Crooker v. United States Dep't of Justice, 632 F.2d 916, 921 (1st Cir. 1980)) ("[A] pro se litigant who has substantially prevailed certainly is entitled to 'litigation costs reasonably incurred.' A pro se litigant is made whole thereby, serving [**12] as a small incentive to pursue litigation if no attorney may be found to represent the litigant."). Accordingly, the Court shall direct plaintiff to submit a Bill of Costs in accordance with Local Civil Rule 54.1 within 30 days of the entry of the Order accompanying this Opinion.

B. Statutory Penalty

ERISA imposes stringent disclosure obligations on administrators of employee benefit plans. See 29 U.S.C. §§ 1024 and 1025. Section 1024 mandates that the administrator "shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." 29 U.S.C. § 1024(b)(4). Any administrator

who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such

failure or refusal results from matters reasonably beyond the control of [*505] the administrator) by mailing the material requested to the last known address of the requesting [**13] participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1).

Whether a district court awards a plaintiff monetary damages under 29 U.S.C. § 1132(c)(1) is a matter of discretion. Hennessy v. Federal Deposit Ins. Corp., 58 F.3d 908, 924 (3d Cir. 1995), cert. denied, 134 L. Ed. 2d 471, 116 S. Ct. 1318 (1996). In deciding whether to assess a penalty under § 1132(c)(1), courts have considered such factors as "bad faith or intentional conduct on the part of the administrator, the length of the delay, the number of requests made and documents withheld, and the existence of any prejudice to the participant or beneficiary." Pagovich v. Moskowitz, 865 F. Supp. 130, 137 (S.D.N.Y. 1994) (citations omitted).

Here, plaintiff first contacted CIGNA on July 29, 1993, indicating that he was seeking information about "AFIA Pension/Retirement Plans 1975-1981." (Defs.' Ex. 1: Letter from Boyadjian to CIGNA (July 29, [**14] 1993.) Boyadjian sought to "obtain benefit plans pertaining to AFIA, effective during the years 1975 to 1981 for Head Office Employees as well as expatriates assigned to Europe." (Id.) By letter dated August 13, 1993, CIGNA responded to plaintiff's inquiry by copying the vesting schedule from the Summary Plan Description. (Defs.' Ex. 2: Letter from Hildy R. Pepper, CIGNA Benefits Analyst, to Boyadjian (Aug. 13, 1993).) It appears that plaintiff then asked Ms. Pepper for a copy of the AFIA Retirement Plan; she responded by sending a booklet summarizing the Plan. (See Defs.' Ex. 3: Summary of Retirement Plan.) n4

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 This second exchange of letters does not appear in the record. There appears to be no dispute, however, that plaintiff was sent a copy of the booklet summarizing the Plan. (See Defs.' Ex. 3; Attach. to Pl.'s Br. in Opp'n to Defs.' Mot. for Summ. J.)

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

According to its terms, the booklet describes

only the highlights of your Retirement Plan. The official Plan Text and Trust Agreement [**15] are always the governing documents. The Plan Text and Trust Agreement, as well as the annual report of Plan operations and Plan description as filed with the U.S. Department of Labor, are available for review by Plan participants or their beneficiaries during normal working hours in the Personnel Department. Requests to review these documents should be directed to your supervisor. Upon written request to the Personnel Officer, AFIA, 1700 Valley Road, Wayne, New Jersey 07470, you or your beneficiary can receive a copy of these documents within 30 days. The law provides that AFIA can charge up to 25 [cents] a page for the reproduction of these documents.

(Id. at 16.)

By letter dated June 22, 1994, plaintiff referenced the language from the booklet quoted above and inquired: "Are there any other exclusions in the official Plan Text not indicated in the booklet, if so can you please send a copy of these exclusions." (Pl.'s Ex. N1: Letter from Boyadjian to Barbara Gaskin, CIGNA's AFIA Retirement Plan Administrator (June 22, 1994).) Plaintiff wrote to CIGNA again on September 8, 1994, and asked for the following information: "copies of sections from the official Plan Text [**16] and Trust Agreement regarding eligibility to the plan and any exclusions. If you can not furnish this information, can you please advise the name and address of the person to contact. This information was previously requested and not received." (Pl.'s Ex. N2: Letter from Boyadjian to Marian Walter, CIGNA Senior Retirement Plan Specialist (Sept. 8, 1994).) Plaintiff repeated his request for this information on January 23, 1995, and again on May 2, 1995. (Pl.'s Ex. N3: Letter from Boyadjian to Theresa Kane, Assistant Director of Retiree Relations (Jan. 23, 1995); Pl.'s Ex. N4: Letter from Boyadjian to Kane (May 2, 1995).)

As detailed above, Boyadjian made numerous requests for the Plan's governing documents. [*506] Plaintiff first requested the official Plan Text and Trust Agreement on June 22, 1994. (See Pl.'s Ex. N1: Letter from Boyadjian to Gaskin (June 22, 1994).) Defendants did not provide this information until September 3, 1996, during the discovery phase of this litigation. Defendants

do not contend that they furnished the documents on some earlier date; indeed, defendants have never attempted to offer plaintiff or this Court any reasonable explanation for their failure to timely [**17] respond to plaintiff's request for information. n5 The Court therefore cannot determine whether defendants' conduct was the result of bad faith or negligence. See Pagovich, 865 F. Supp. at 138; Garred v. General Am. Life Ins. Co., 774 F. Supp. 1190, 1201 (W.D. Ark. 1991) ("Defendants admit they did not furnish a copy of the summary plan description upon request. No explanation is offered in the answer or in the brief to the court for this omission. We cannot determine whether the failure to respond was through neglect or misfeasance.").

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 Defendants have not addressed Boyadjian's request for a statutory penalty, other than to assert that the "relief requested by plaintiff is not warranted." (Defs.' Letter Br. dated May 12, 1997, at 1.)

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Moreover, although the Court need not find that plaintiff was prejudiced by defendants' failure to comply with ERISA's disclosure requirements, n6 it seems clear that plaintiff has been harmed by defendants' conduct. Boyadjian was compelled to initiate this lawsuit and [**18] invest many hours of his time in order to receive information to which he was entitled. See Pagovich, 865 F. Supp. at 138. The Court has no reason to disbelieve plaintiff's assertions that he has been distressed and frustrated by defendants' failure to provide the Plan's governing documents. Accordingly, the Court finds that the number of requests made by plaintiff, the length of the delay, defendants' failure to provide any explanation for the delay, defendants' failure to locate the records establishing plaintiff's benefits eligibility until after plaintiff, appearing pro se, successfully defended against a summary judgment motion, and the harm to plaintiff all weigh in favor of the imposition of a penalty against the Administrator.

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n6 See Moothart v. Bell, 21 F.3d 1499, 1506 (10th Cir. 1994) (citations omitted) ("The circuits are in general accord that neither prejudice nor injury are prerequisites to recovery under

the penalty provisions of the statute. Instead, these are factors the district court may consider in deciding whether to exercise its discretion to award a penalty."); Pagovich, 865 F. Supp. at 137 (citations omitted) ("Every circuit which has squarely considered the issue has determined that prejudice or injury to a participant is not a prerequisite to the award of statutory penalties for the administrator's failure to disclose requested documents."). But see First Atlantic Leasing Corp. v. Tracey, 738 F. Supp. 863, 876 (D.N.J. 1990) (quoting Kelly v. Chase Manhattan Bank, 717 F. Supp. 227, 233 (S.D.N.Y. 1989)) ("Plaintiff must demonstrate that 'he has suffered some degree of harm resulting in the delay' in his receipt of information to have a valid claim under ERISA.").

- - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**19]

Having concluded that the statutory penalty is warranted, the Court must determine the size of the penalty. ERISA provides that the district court, in its discretion, may award "up to $ 100 a day" from the date of the administrator's failure to provide requested information. 29 U.S.C. § 1132(c)(1). This amount is a ceiling, not a floor, on the penalty a court may impose.

There is little precedent to guide the Court in the exercise of its discretion as to the amount of the penalty under 29 U.S.C. § 1132(c)(1). Pagovich, 865 F. Supp. at 138. Courts have imposed a wide range of penalties under the statute. See Moothart v. Bell, 21 F.3d 1499, 1506 (10th Cir. 1994) (finding that district court did not abuse its discretion in imposing a penalty of $ 30 per day where there was little prejudice to plaintiff); Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir.) (upholding statutory penalty of $ 25 per day for 278 days), cert. denied, 488 U.S. 826, 102 L. Ed. 2d 52, 109 S. Ct. 76 (1988); Hamilton v. Mecca, Inc., 930 F. Supp. 1540, 1557 (S.D. Ga. 1996) ("Although [the administrator] could be required to pay as much as $ 11,100.00 in penalties under § 502(c) (up to $ [**20] 100 per day x 111 days), the Court concludes that an award of $ 5,000 is 'sufficient to accomplish the salutary purposes of the statute in this particular case.'"); Krawczyk v. Harnischfeger Corp., 869 F. Supp. 613, 632 (E.D. Wis.) (assessing penalty of $ 100 per day for twenty-two [*507] day delay in responding to former employee's request for a copy of benefit plan), aff'd, 41 F.3d 276 (7th Cir. 1994); Pagovich, 865 F. Supp. at 138 (finding that administrator's "breaches of duty are deplorably raw," and imposing penalty of $ 75 per day); Phillips v. Riverside, Inc., 796 F. Supp. 403, 411-12 (E.D. Ark. 1992)

(imposing statutory penalty of $ 5 per day and awarding attorneys' fees despite absence of bad faith on part of administrator); Garred, 774 F. Supp. at 1201 (assessing penalty of $ 50 per day for failure to supply requested information); Thomas v. Jeep-Eagle Corp., 746 F. Supp. 863, 864-65 (E.D. Wis. 1990) (assessing fine of $ 50 per day where "the record is devoid of facts justifying the failure to respond to the plaintiff's inquiry").

The Court finds that $ 75 per day is an appropriate penalty in the case at hand. Plaintiff first requested a copy of the official [**21] Plan Text and Trust Agreement on June 22, 1994. Because plan administrators have 30 days to comply with requests for information, 29 U.S.C. 1132(c)(1), penalty calculations begin 31 days after a request is made. See Bartling v. Fruehauf Corp., 29 F.3d 1062, 1069 (6th Cir. 1994) (citations omitted) ("Most of the district courts that have considered the question have held that § 1132(c)(1) penalty calculations begin only 31 days after the plaintiffs made their document requests."). Calculation of the penalty in this case, therefore, shall run from July 23, 1994, through and including September 2, 1996, the day before defendants furnished the requested documents. The impermissible delay consists of 773 days and penalties are therefore awarded against the Administrator in the amount of $ 57,975.00.

C. Emotional Distress/Punitive Damages

Plaintiff seeks "punitive damages and emotional distress at one half each representing the plaintiff's contribution to AFIA for eleven years of service at the current average rate of 70,000 dollars per annum totaling 770,000 dollars." (Compl. at 3.) Defendants argue that ERISA "does not provide for recovery of emotional distress damages." [**22] (Defs.' Reply Br. at 1.)

ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The phrase "relate to" has been construed broadly. Pane v. RCA Corp., 868 F.2d 631, 635 (3d Cir. 1989). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." n7 Id. (quotation omitted).

- - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n7 The United States Supreme Court addressed ERISA

preemption in Pilot Life Insurance Co. v. Dedeaux:

The detailed provisions of § 502(a) [29 U.S.C. § 1132(a)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."

481 U.S. 41, 54, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985)).

- - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**23]

Here, it is clear that plaintiff's emotional distress claim has a connection with or reference to an employee benefit plan. (See Compl. at 2 ("The plaintiff has suffered two years of emotional distress caused by a struggle for a right which should be awarded automatically as provided in the plan . . . .").) Because Boyadjian's emotional distress claim relates to the Plan, it is preempted under ERISA, 29 U.S.C. § 1144(a). See Pane, 868 F.2d at 635 (citations omitted) ("State law claims of emotional distress arising out of the administration of an ERISA employee benefit plan are also preempted."); see also Rholdon v. Bio-Medical Applications, 868 F. Supp. 179, 182 (E.D. La. 1994) (dismissing as preempted intentional infliction of emotional distress claims based on employer's refusal to provide notice under COBRA, refusal to process claim forms, and cancellation of plaintiff's insurance).
[*508] Boyadjian also seeks punitive damages. It has been consistently held, however, that 29 U.S.C. § 1132(a) does not authorize such relief. Pane, 868 F.2d at 635 n.2 (citations omitted); see also Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 286 (2d Cir. 1992) (holding [**24] that punitive damages are not available under § 1132(a)).

Accordingly, the Court shall grant defendants' motion for summary judgment with respect to plaintiff's emotional distress and punitive damages claims.

An Order accompanies this Opinion.

ORDER

For the reasons stated in the accompanying Opinion,

IT IS, therefore, on this 30th day of July, 1997, ORDERED that the motion for summary judgment by defendants CIGNA Companies, AFIA Worldwide Insurance, and CIGNA's AFIA Retirement Plan Administrator be and hereby is GRANTED with respect to plaintiff's claims for: (1) retirement benefits; (2) attorneys' fees; (3) emotional distress; and (4) punitive damages; and

IT IS FURTHER ORDERED that defendants' motion for summary judgment be and hereby is DENIED with respect to plaintiff's claims for: (1) costs; and (2) a statutory penalty; and

IT IS FURTHER ORDERED that the motion for summary judgment by plaintiff Robert Boyadjian be and hereby is GRANTED with respect to plaintiff's claims for: (1) costs; and (2) a statutory penalty in the amount of $ 57,975.00; and

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment be [**25] and hereby is DENIED with respect to plaintiff's claims for: (1) retirement benefits; (2) attorneys' fees; (3) emotional distress; and (4) punitive damages; and

IT IS FURTHER ORDERED that plaintiff serve and file a Bill of Costs in accordance with Local Civil Rule 54.1 within 30 days of the entry of this Order.

MARY LITTLE PARELL

United States District Judge

UNITED STATES COURT OF APPEALS SUR PETITION
FOR REHEARING
DATED, THE 1st DAY OF FEBRUARY, 2000

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 98-5191
ROBERT BOYADJIAN, Appellant V. CIGNA COMPANIES; AFIA WORLDWIDE INSURANCE; CIGNA AFIA RETIREMENT PLAN ADMINISTRATOR
SUR PETITION FOR REHEARING
Before: BECKER, Chief Judge, MCKEE and COWEN, CIRCUIT JUDGES

The petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the panel, and no member of the panel having asked for rehearing, the petition for panel rehearing is denied

By the Court,
signature
Circuit Judge
Dated: FEB 1 2000

APPENDIX D